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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 523

HARRY GOLDMAN, *Petitioner,*

vs.

GENERAL MILLS, INC., a Corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TEXTS CITED:

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Who's Who in America, Vol. 25, 1948-49, p. 2156 17

Gordon, Standard Annotated Real Estate Forms (1938), No. 296, p. 598 18

Jones, Legal Forms Annotated (9th Ed.), 1946), No. 41-103, p. 1302 18

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OPINIONS BELOW

The memorandum of the district court explaining its order denying respondent's motion to set aside the verdict and enter judgment for respondent (R. 490) is not reported. The opinion of the court of appeals (R. 532) is reported at 184 F. (2d) 359. The dissenting opinion of Circuit Judge Sanborn (R. 545) is reported at 184 F. (2d) 367.

JURISDICTION

The judgment of the court of appeals was entered September 19, 1950 (R. 561). Petitioner's petition for a rehearing was duly filed October 19, 1950 (R. 562, 583), and was denied November 9, 1950 (R. 585). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether, in diversity cases, a district court's determination of the controlling local law may arbitrarily be rejected by the court of appeals.

2. Whether a district court's determination of the facts, sustained by the evidence, may arbitrarily be rejected by the court of appeals.

3. Whether, under Minnesota law, a tenant is exculpated from liability in tort for negligently causing the leased premises to burn, by virtue of a covenant in the lease that the tenant will return the premises at the end of the term in good condition, "loss by fire and ordinary wear excepted."

STATEMENT

By lease dated November 1, 1946, the Char-Gale Manufacturing Company leased to General Mills, Inc., respondent, certain premises and the building thereon in an industrial area of Minneapolis for general manufacturing, warehouse and office purposes (R. 1, 4, 77, 78). The lease was to run for a term of ten years commencing January 1, 1947, at a total rental of $150,000, payable in quarterly installments of $3,750 (R. 78-79). In addition the tenant, respondent, was to pay the real estate taxes (R. 79).

The entire lease was introduced in evidence by petitioner and appears in the record (R. 78-89). It contains many provisions usual in leases of industrial properties. One of the most important paragraphs for purposes of this case is entitled, "Tenant to Maintain Surrender Premises in Good Order," and provides:

> "The said Tenant also covenants and agrees with the Lessor as follows: That the Tenant will keep at

its own expense said demised premises and the equipment, plumbing, drains, fixtures, appliances and machinery in, upon, serving or appurtenant to said demised premises, in good repair and in good sanitary condition during said term, and that it will replace at its own expense promptly any and all glass broken in or about said premises with glass of the same quality; and that it will not use or permit anything upon said premises that will increase the rate of insurance thereon, or anything that may be dangerous to life or limb, and that it will not in any manner deface or injure said demised premises, or any part thereof, or overload the floors, or do or permit anything to be done upon said premises or in the passageways, alleys, areas, area-ways, sidewalks or streets adjacent thereto, that will amount to or create a nuisance; and that it will not use said premises or permit the same or any part thereof to be used for lodging or sleeping purposes, or for any purpose contrary to the laws, ordinances or regulations of the United States of America or the state of Minnesota, or the city of Minneapolis, or of any rules or regulations of the city of Minneapolis, or of any boards or officers of said city; and the Tenant agrees to return said premises peaceably and promptly to the Lessor at the end of the term of this lease, or at any previous termination thereof, in as good condition as the same are now in or may hereafter be put in, loss by fire and ordinary wear excepted" (R. 79-80).

The lease's paragraph on "Liability of Lessor and Tenant" provides in part:

"The Tenant further agrees that the Lessor shall not be liable for any damage, either to person or persons or property or the loss of property sustained by the Tenant, or by any other person or persons due to the demised premises * * * being or becoming out of repair or defective, or due to the happening of any accident, or due to any act or neglect of the Tenant, * * * or of any other person, * * * or by the use or misuse of any instrumentality or

agency * * * or occasioned by any nuisance [on the premises] * * *

"The Tenant assumes all liability and obligation on account of all damages on account of the matters and things above referred to, and agrees to save the lessor harmless thereon and therefrom, and to indemnify the Lessor on account thereof * * *" (R. 81-82).

The lease's paragraph entitled "Destruction by Fire" provides in substance that if the premises should be destroyed by fire or the elements so as to be unfit for occupancy, the lessor could terminate the lease and re-enter, and rent would cease; but if the premises could be restored within sixty days, and the lessor within fifteen days elected to do so, then the lease would not end but there would be pro rata abatement of rent during the repair period (R. 83-84).[1]

There is no provision in the lease imposing on either the lessor or the tenant the duty of obtaining insurance (R. 78-89). In fact, there is no reference of any kind in the lease to insurance except the statement that the tenant "will not use or permit anything upon said prem-

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[1]It will be noted from these provisions that, as the trial court instructed the jury (R. 449), "a reading of the lease between these parties does not indicate that the tenant * * * has any right to quit and surrender possession of these premises in the event of fire; and the only rights in the lease in case of fire are reserved to the lessor, that is, the owners of the building. Therefore we must resort to this statute * * * to determine whether or not the defendant (respondent) is still liable for the unpaid portion of the rent, notwithstanding the fact that the building is destroyed." The Minnesota statute referred to is M. S. A., Sec. 504.05, which provides:

"The lessee, or occupant of any building which without fault or neglect on his part, is destroyed or is so injured by the elements or any other cause as to be untenantable or unfit for occupancy, is not liable thereafter to pay rent to the lessor or owner thereof unless otherwise expressly provided by written agreement; and the lessee or occupant may thereupon quit and surrender possession of such premises."

ises that will increase the rate of insurance thereon" (R. 79).

At the end of the lease is the provision:

> "There are no understandings or agreements outside of this lease" (R. 89).

The lease was drawn by an attorney for respondent, after a conference in which such attorney, the attorney for petitioner, and others participated (R. 527).

On or about November 15, 1946, the lessor, Char-Gale Manufacturing Company, entered into a contract with petitioner to sell the premises to him, and about that date also assigned its interest under the lease to petitioner (R. 77, 91, 139, 427, 525). The deed from the company to petitioner was dated January 28, 1947 (R. 2, 4-5).[2]

Petitioner paid $110,000 for the property (R. 139, 427, 526). He financed the purchase in part by executing a mortgage for $80,000 to a Minneapolis bank (R. 256). After his purchase he made substantial improvements to the building (R. 139). He bought the property as income property and one consideration inducing the purchase was the fact that there was a lease from the Char-Gale Company to respondent (R. 145, 527).

Petitioner on or about January 28, 1947, procured from the Indiana Lumbermen's Mutual Insurance Company and maintained in effect, a Minnesota standard fire insurance policy insuring the property for $100,000

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[2]More specifically, after petitioner and his wife received the assignment of lease, they in turn assigned a part interest therein to certain of their relatives, and the premises were deeded to petitioner, his wife and these relatives (R. 4-5, 90-91). However, after the building was destroyed by fire, the claims of the wife and these relatives against respondent were assigned to petitioner (R. 144) and, since it seems immaterial that the wife and these relatives for a time had an interest in the instant claim, petitioner will be referred to throughout this statement as the owner of the premises and assignee of the lease.

against destruction by fire and insuring against loss of rents on account of such destruction in the amount of $15,000 (R. 6, 11, 13, 143, 431). Petitioner limited the insurance to $100,000 on the property because insurance rates were high and he desired to minimize expenses (R. 145).

Respondent entered into possession of the property under the lease in February, 1947 (R. 525). On March 29, 1947, an employee of respondent telephoned petitioner's attorney and told the attorney, "I just received the lease agreement and I want to have an understanding on the fire insurance on the building." The attorney told him that petitioner had fire insurance (R. 237-241).

Respondent used the leased property for the manufacture of small pressure cookers (R. 427). On January 15, 1948, respondent was in sole possession of the leased property (R. 5). On that date, the building was completely destroyed by fire (R. 5, 425). The fire was caused by the negligence of respondent, whose employee carelessly placed a very hot pot under coolant liquid, a mixture of oil and kerosene, which liquid was used as a cooling agent in connection with the operation of one of respondent's machines.[3]

On March 3, 1948, respondent wrote petitioner's attorney that the building had been almost wholly destroyed by fire on January 15, 1948, that in the absence of notice from petitioner of his intention to restore the premises

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[3]The question of negligence is not presently involved. The jury by answers to special interrogatories and by its general verdict found that respondent was negligent and that such negligence proximately caused the fire which destroyed the building, and the trial court emphatically approved this finding (R. 470, 472, 491-492). The opinion of the court of appeals leaves the conclusion of negligence undisturbed, holding only that respondent was exculpated from the consequences of any negligence by virtue of the "loss by fire" provision of the lease quoted, **supra**, in this statement (R. 538-544; 184 F. (2d) at 363-366).

within the time limit prescribed in the lease, which respondent assumed to be a physical impossibility, respondent was treating the lease as having terminated on the date of the fire (R. 93).

About March 8, 1948, the Indiana Lumbermen's Mutual Insurance Company, pursuant to the above mentioned policy, paid petitioner $100,000 on account of destruction of the building and $10,643.90 on account of rent loss, a total of $110,643.90 (R. 143). Thereupon petitioner assigned to the insurance company, to the extent of such payment, petitioner's right to recover satisfaction for the loss sustained by him (R. 143-144).

On March 17, 1948, petitioner commenced suit in the district court to recover damages from respondent on account of its negligent burning of the building (R. 1-3). The gravamen of the action was respondent's alleged negligence (R. 2). Respondent's answer, among other defenses, denied negligence and claimed exoneration from all liability because of the terms of the lease (R. 3-8). The insurance company filed its complaint in intervention alleging its payment of $110,643.90 to petitioner and the above-mentioned partial assignment of petitioner to it (R. 9, 11, 12), and participated in the trial as intervenor (R. 15).[4]

After a lengthy trial at which most of the evidence concerned the issue of negligence not presently involved (R. 16-77, 95-138, 147-236, 241-417), the jury answered in petitioner's favor special interrogatories on negligence, proximate cause and damages, and returned a general verdict in petitioner's favor for $198,678 (R. 470-472). Respondent moved to set aside the verdict and

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[4]Diversity existed in that petitioner is a citizen of Louisiana (R. 1, 139), respondent is a Delaware corporation (R. 1, 3) and intervenor is an Indiana corporation (R. 9, 12).

enter judgment for it, or for a new trial, alleging principally (i) that the court erred in instructing the jury on the measure of damages, (ii) that the finding of negligence was not sustained by the evidence, and (iii) that in any event, respondent was exonerated from liability for negligence by the lease (R. 475-486). The court concluded it had erred on the measure of damages and under FRCP 59(a) awarded a new trial on the question of damages only (R. 500), which is mentioned more fully below.

The court, however, denied respondent's motion in all other respects (R. 501). He held that the evidence amply sustained the jury's finding on negligence and that "a contrary conclusion would itself be error * * *" (R. 491-492). He considered at length, in the light of controlling Minnesota law, respondent's contention that it was exonerated by the lease's provisions from liability for negligence (R. 492-498). After quoting the lease's paragraph, "Tenant to Maintain Surrender Premises in Good Order," quoted *supra,* which concludes with "loss by fire and ordinary wear excepted," the court stated:[5]

> "Whether this underlined provision [*i.e.,* "loss by fire and ordinary wear excepted"] exempts defendant from liability for negligently setting fire to the building depends, as both plaintiff and defendant recognize, upon the intent of the parties to the contract. And that intent is determined by reading the paragraph in its entirety, in light of its purpose and the other provisions of the lease. Commercial Union Assurance Co. v. Foley Bros., 141 Minn. 258, at 260. The provision in question does not expressly relieve defendant for its negligent setting of a fire. It merely refers to 'loss by fire.' It does not refer to the manner, or means, by which the fire is started. So the provision is somewhat ambiguous upon the ques-

[5]In many of the quotations throughout this petition, the designation of the parties is retained as it was in district court, petitioner here having been plaintiff there, respondent here having been defendant there.

tion of whether the defendant was relieved for negligently setting the fire.

"The Court should not construe the provision liberally in favor of an exemption for negligent conduct. For to do so would contradict the public policy which holds that persons who commit a negligent act are responsible for the result of that act. Public policy must be consistent, and, consequently, requires that contracts which seek to negative liability for negligence must be clear, Williston on Contracts, Sec. 1751C, and must be strictly, not liberally construed. That the Minnesota Supreme Court has applied this rule is apparent from the court's refusal to permit the provision in Gross v. General Invst. Co., 194 Minn. 23, 259 N. W. 557, to exempt that defendant from its own negligence.

"The provision of which this alleged exculpatory clause is a part obviously was designed for the benefit of the lessor, not the tenant. For it requires acts favorable to the lessor. It states the duties, not the rights, of the tenant. Its purpose is to protect the lessor from the damages to his property. Consequently, that part of the provision which relates to the loss by fire must be read in light of that purpose. That purpose, obviously, is inconsistent with the construction that the phrase 'loss by fire' was intended to permit defendant to destroy the property negligently by fire.

"Reference to the other parts of the provision also show that, in carrying out the purpose to protect the lessor, the provision did not intend to relieve defendant of negligent acts of any sort. For example, the lessee covenants therein that it will not 'in any manner * * * injure said * * * premises.' And the provision quoted also required defendant not to use or permit anything upon the premises that would increase the insurance or which may be dangerous to life or limb. That such prohibitions intend that negligent operations be prevented is evident. Negligent acts obviously affect insurance rates and would be dangerous to life and limb. And a negligent manner of operation can clearly injure the premises. To

construe that part of the provision relating to fire losses as including fires negligently set by defendant would nullify that intent. The prohibited acts could be committed with respect to fire risk without any danger of liability. The provision must be construed consistently. No good reason is suggested why defendant should be relieved from negligent fires but held responsible for other negligent acts. Defendant does suggest that insurance against fire may be obtained. But it is common knowledge that insurance against other types of negligent and non-negligent acts can also be obtained.

"Moreover, even the phrase following the phrase 'loss by fire' indicates an intent that the so-called exception in which the phrase 'loss by fire' is found was not intended to relieve against negligent acts. The wear spoken of in that phrase is limited specifically to 'ordinary' wear. Like the main part of the paragraph, it does *not* include negligent wear. It is consistent with the provision's purpose to protect the lessor against injuries to the property through the acts and occupancy of the tenant. And by its own terms it is consistent with the other phrases of the provision which show an intent that defendant should be liable for its negligent acts and protect the lessor from them. It does not relieve defendant of negligence. Because the phrase referring to loss by fire is directly related to the phrase concerning wear, it must be interpreted with that phrase in mind. Not to do so would ignore the relationship between parts of the same exception as well as parts of the same paragraph. In view of these premises, therefore, it seems clear that the phrase 'loss by fire and ordinary wear * * * excepted' does not relieve defendant from liability for negligently setting fire to plaintiff's building" (R. 492-494).

"Defendant points out that plaintiff carried fire insurance on the premises and that defendant was obligated by the lease to maintain the premises so as not to increase the insurance rates. But because the lessor is the party who carries fire insurance on the building does not mean that the parties intended

that the tenant could negligently destroy the building by fire without liability to anyone. The lease does not require the lessor to carry any insurance, and if the acts of the parties as to insurance procurement are to carry weight in determining the intent of the lease as to defendant's liability for negligently destroying the property by fire, it is very significant to note that the policy which plaintiff obtained with defendant's knowledge does not purport to cover the negligent acts of defendant in causing the fire, nor to protect defendant against any loss. On the contrary, the policy which plaintiff obtained shows that the insurance was intended to protect plaintiff. Defendant's contention that because plaintiff could obtain insurance against fire losses, it should have been entitled to assume that it would not be liable for negligently setting a fire really concerns what might have been arranged, or what could have been done, not what was intended in this particular situation. And defendant's position in this regard is contrary to the rule that persons are liable for their negligent acts unless clearly relieved of them in the particular situation * * *" (R. 495-496).

"Defendant urges that the intervening insurer should not be subrogated to plaintiff's claim for negligence against defendant. But because plaintiff obtained insurance for himself does not mean that he also was obligated to obtain insurance at his expense for the benefit of the defendant, who was receiving the use of the property by the payment of annual rent. Defendant assumes and contends that the insurance premiums were paid with the rent money received by the plaintiff and therefore that the defendant should be given the benefits of the insurance purchased and paid to the plaintiff. But there is no evidence that plaintiff paid the premiums out of his rent, rather than from any other funds on hand. Defendant has not shown that the premiums which the insurance company received were derived from the rental payments. No separate part of the rent money was earmarked for insurance money

> and part for rent. And it does not appear that the insurance premiums entered into the determination of the rental price. This is evident from the conferences between the parties after the lease was executed. The parties at that time were not certain who should procure the insurance and the understanding was that plaintiff assumed the responsibility for the insurance coverage on the building for fire, windstorm, etc. The amount of the insurance was left to the plaintiff. At his option, he could carry full coverage, or a sum much less than the value of the building if he so desired. It seems obvious, therefore, that no definite amount was included within the rent to cover insurance premiums, as defendant's argument assumes. To deny subrogation to the insurer because the amount of plaintiff's rent may have indirectly included allowance for insurance premiums would weight that factor more than the record justifies" (R. 496-497).

Pursuant to the aforementioned order granting a new trial on the issue of damages only (R. 501), the case was called for trial on that issue (R. 502). The parties thereupon duly stipulated that if such issue were tried, the jury would return a verdict for $142,500 in petitioner's favor including interest to that date, October 12, 1949 (R. 502-503). Pursuant to this stipulation, judgment for petitioner was entered on October 12, 1949 for $142,500, reserving full rights of appeal (R. 504-505).[6] The court held that it was not necessary to enter a judgment in intervenor's favor, as requested by intervenor, because intervenor had an interest in petitioner's judgment and could participate in the appeal fully, since the judgment

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[6]Taking the stipulated amount, $142,500, as the loss resulting from the fire, it will be noted that petitioner, by virtue of the court of appeals' reversal, is out $31,856.10, the difference between the stipulated loss and the insurance company's payment to him of $110,643.90, plus interest from October 12, 1949, and costs.

in petitioner's name was in effect a judgment in trust for intervenor to the extent of the latter's interest (R. 510).

Respondent appealed to the court of appeals from the judgment entered for petitioner, contending principally (i) that the evidence was insufficient to sustain the finding of negligence, (ii) that respondent's liability, if any, should be limited to such amount as petitioner's loss on the building exceeded his insurance recovery, and (iii) that respondent was wholly exonerated from liability for any negligence by virtue of the "loss by fire" provision of the lease. The majority opinion of the court of appeals did not consider claims (i) or (ii), but reversed the judgment for petitioner and ordered judgment for respondent on the sole ground that respondent was exonerated by the lease from any liability for negligence (R. 538-544; 184 F. (2d) at 363-366).

The rationale of the majority opinion is that there was a "mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage" (R. 539; 184 F. (2d) at 364); that the circumstances "indicate the intention that the cost of insurance would be taken out of the rentals" and "In practical effect the tenant paid the cost of the fire insurance"; that "in the light of all the provisions of the lease, the circumstances of its execution and the understanding about fire insurance coverage to which the lease was related" the expression "loss by fire" should be taken to include loss by fire caused by negligence (R. 543; 184 F. (2d) at 366).

Circuit Judge Sanborn, in dissenting, did not attempt "a dissection and criticism of the majority opinion" but rather preferred "to submit as my dissent the opinion prepared by me, showing how I believe the case should be decided" (R. 545; 184 F. (2d) at 367). Therefore his

opinion is framed to be dispositive of all issues raised by the appeal, on the assumption of affirmance of the district court's judgment. After stating the facts substantially as given in this statement (R. 545-550; 184 F. (2d) at 367-369), he points out that "The applicable substantive law is that of Minnesota" (R. 550; 184 F. (2d) at 369) and that "Concededly, there is no Minnesota case holding that a covenant such as that here involved has the effect which [respondent] asserts should be given to it" (R. 551; 184 F. (2d) at 370).

Judge Sanborn then states:

> "It seems to me that the covenant to surrender the premises in good condition, 'loss by fire and ordinary wear excepted,' reasonably may not be construed to relate to the lessee's tort liability, but only to its contractual liability to make repairs or rebuild in case of the destruction of the building by fire. Apparently the reason for inserting exceptions, such as those here involved, in surrender clauses of leases was to relieve a tenant, who had agreed to keep the premises in repair, from any contractual liability to repair or rebuild structures injured or destroyed by fire or from having to answer in damages measured by the reproduction cost of such structures" (R. 551; 184 F. (2d) at 370).

Judge Sanborn then reviews the Minnesota authorities which he believes substantiate the foregoing, and states:

> "The case of Wright v. Tileston, 60 Minn. 34, 37-38, 61 N. W. 823, 824, I think clearly indicates that a tenant's tort liability for negligence and carelessness causing damage to leased premises is something quite apart from the tenant's contractual liability to pay rent or make repairs, and that the exceptions contained in the conventional surrender clause of a lease do not exonerate the tenant from his tort liability, even though the damage is caused by one of the elements referred to" (R. 553; 184 F. (2d) at 370-371).

In concluding his opinion on the point of respondent's claimed exculpation from liability for negligence, Judge Sanborn states:

> "But even if the question of the asserted exoneration of the defendant under the exception 'loss by fire' in the surrender clause of the lease were doubtful—which I think it is not—this Court should accept the views of the District Court as to that question of local law. Magill v. Travelers Insurance Co. (8th Cir.), 133 F. (2d) 709, 713; Doering v. Buechler (8th Cir.), 146 F. (2d) 784, 788; Russell v. Turner (8th Cir.), 148 F. (2d) 562, 564; Mast v. Illinois Central R. Co. (8th Cir.), 176 F. (2d) 157, 163; Northern Liquid Gas Co. v. Hildreth (8th Cir.), 180 F. (2d) 330, 336" (R. 554; 184 F. (2d) at 371).[7]

Petitioner duly petitioned for rehearing, pointing out among other things that the majority's assumption that there was a "mutual understanding of the parties * * * that loss by fire should be provided against by fire insurance" was wholly unsupported by the evidence (R. 562-583), but the petition resulted in no relief for petitioner other than correction of the court of appeals' order on costs (R. 585).

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[7]The opinion thereafter concludes that the finding of negligence is sustained, the court's instruction on liability and its limitation of the new trial to the issue of damages alone correct, and that, under controlling Minnesota law, it is of no concern to respondent that the insurer is entitled to recoup its loss out of what respondent owes petitioner (R. 554-560; 184 F. (2d) at 371-374).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In rejecting the district court's clearly correct determination of Minnesota law.

2. In substituting its own determination of fact for that of the district court.

3. In holding, without any support in the evidence, that there was a mutual understanding between the parties when the lease was entered into that loss by fire should be provided against by fire insurance.

4. In assuming, contrary to Minnesota law, that petitioner's procurement of fire insurance relieved respondent from liability for negligently causing the fire.

5. In holding, contrary to Minnesota law, that respondent is exculpated from liability for negligently causing the fire by reason of the lease's covenant that respondent would return the premises in good condition, "loss by fire and ordinary wear excepted."

6. In reversing the judgment for petitioner.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Preliminary Statement.

As noted, the lease provides:

> "* * * and the tenant agrees to return said premises * * * at the end of the term of this lease, or at any previous termination thereof, in as good condition as the same are now or may hereafter be put in, loss by fire and ordinary wear excepted" (R. 80).

Chief Judge Nordbye of the U. S. District Court for the District of Minnesota, after exhaustive considera-

tion, reached the conclusion that under Minnesota law the foregoing covenant does not exculpate respondent from liability for negligently causing the fire (R. 490-498). Chief Judge Nordbye's entire legal career, commencing in 1912, has been in Minnesota; he has been in judicial service in Minnesota continuously since 1922.[8] Circuit Judge Sanborn, the only judge on the court of appeals from Minnesota, completely and explicitly concurred with Judge Nordbye (R. 545; 184 F. (2d) at 367). All of Judge Sanborn's legal career, which commenced in 1907, was in Minnesota until his appointment in 1932 as circuit judge.[9]

Nevertheless the majority of the court of appeals, without citing a single Minnesota or other authority respecting the covenant's meaning, has refused to follow the determination of Minnesota law made by these experienced Minnesota jurists. It is respectfully submitted that, in thus refusing, the court in an important matter has so departed both from controlling Minnesota law and the accepted and usual course of judicial proceedings, as to require this Court's exercise of its certiorari jurisdiction.

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[8]"Nordbye, Gunnar Hans * * * judge; * * * LL.B., U. of Minn., 1912; * * * In practice of law at Minneapolis, Minn., 1912-22; judge of Municipal Court, Minneapolis, 1922-25; judge Dist. Court, 4th Minn. Jud. Dist., 1925-31; judge U. S. Dist. Court, Dist. of Minn., since 1931 * * *." Who's Who in America, Vol. 25, 1948-49, p. 1838.

[9]Sanborn, John B., judge; b. St. Paul, Minn. * * * A.B., U. of Minn., 1905; LL.B., St. Paul Coll. of Law, 1907; * * * Admitted to Minn. bar 1907, and began practice at St. Paul; * * * mem. Minn. Ho. of Rep. 1913-15; atty. and trust officer Capitol Trust & Savings Bank, St. Paul, 1914-16; Commr. of Insurance, Minn., 1917-18 and Jan. 1919-July 1, 1920; membr. Minn. Tax Comm., 1920-21; judge of Dist. Court, Minn., 1922-25; U. S. Dist. Judge, Dist. of Minn., 1925-32; U. S. Circuit Judge, 8th Circuit, since Jan. 23, 1932 * * *." Who's Who in America, Vol. 25, 1948-49, p. 2156.

I.

The Matter Involved Is Important.

Covenants in leases substantially identical with that here involved, providing that the lessee shall, at the termination of the lease, return the premises to the lessor in good condition, "loss by fire and ordinary wear excepted," apparently are standard covenants in American leases. See *Gordon, Standard Annotated Real Estate Forms* (1938), No. 296, p. 598; *Jones, Legal Forms Annotated* (9th Ed., 1946), No. 41-103, p. 1302. Whether or not such a covenant exculpates a lessee from liability for fire caused by his negligence, is obviously a question of general interest throughout the United States.

II.

The Court of Appeals Has Decided an Important Question of Minnesota Law in a Way in Conflict With Applicable Local Decisions.

and

III.

Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Reasons II and III are dependent upon substantially the same facts and may be considered together.

(1)

*The court of appeals arbitrarily rejected the trial court's clearly correct determination that, under Minnesota law, the "loss by fire * * * excepted" covenant does not exculpate respondent from negligence.*

The opinion of Circuit Judge Sanborn shows that the trial court was clearly right in his determination of Minnesota law (R. 550-553; 184 F. (2d) at 369-371). As Judge Sanborn concludes, the controlling Minnesota case is *Wright v. Tileston,* 60 Minn. 34, 61 N. W. 823. In that case the lessor's assignee first recovered a judgment against the lessee on the lessee's covenant to pay rent. Then the assignee sued the lessee for the lessee's negligence in caring for the leased premises, a dam for the use of water power and appurtenances. The lease contained the covenant that the lessee "will, at the expiration of the time, * * * quietly yield and surrender the aforesaid premises * * * in as good condition and repair as when he took them, reasonable wear and tear and damages by the elements alone excepted" (60 Minn. at 37). The lessee's defense was that the suit was on this covenant and was barred by the first judgment on the covenant for rent. The Minnesota Supreme Court unanimously affirmed the striking of this defense, holding that the action was one for tort purely, although the existence of the lease furnished the opportunity for committing the tort. The court, after quoting the above covenant, said:

> "* * * The very exception stated in the lease, in connection with the allegation that the damages were caused by high water, and through the negligence and careless management of the premises by the defendant, takes the complaint entirely out of the rule contended for by the defendant. By the explicit terms of the lease, he was not to return the premises in as good condition and repair as when he took them, if the damages to the premises were the result of the elements. This is the exact damage which it is alleged resulted to the premises; that is, by the element of water coming upon the premises in such a flood or torrent that the wing of the dam was totally destroyed and the premises otherwise greatly

injured and damaged, and that this result was caused by the negligent and careless management of the property by the defendant. That a tenant is liable for negligence and carelessness in the management of the leased premises, whereby damage results to such premises, is quite clear as a matter of law. Of course, upon this view of the case, the former judgment is not a bar to the plaintiff's maintaining this action." (60 Minn. at 37-38.)

Judge Sanborn correctly epitomizes the holding of *Wright v. Tileston* and its controlling effect here:

"The case of *Wright v. Tileston,* 60 Minn. 34, 37-38, 61 N. W. 823, 824, I think clearly indicates that a tenant's tort liability for negligence and carelessness causing damage to leased premises is something quite apart from the tenant's contractual liability to pay rent or make repairs, and that the exceptions contained in the conventional surrender clause of a lease do not exonerate the tenant from his tort liability, even though the damage is caused by one of the elements referred to" (R. 553; 184 F. (2d) at 370-371).

As Judge Sanborn stated: "Concededly there is no Minnesota case holding that a covenant such as that here involved has the effect which [respondent] asserts should be given to it" (R. 551; 184 F. (2d) at 370). We believe there is no such case in Anglo-American jurisprudence. In any event, neither counsel on either side, the district court, nor either opinion in the court of appeals, cites one. The Minnesota rule is the declared rule wherever the *precise* point here raised has been decided—whether the covenant involved exculpates from liability in *tort* for *negligence.* As Judge Sanborn pointed out:

"In 32 Am. Jur., Landlord and Tenant, Sec. 783, page 669, it is said:

> '* * * A tenant is, however, liable for injury to his landlord from the destruction by fire of a building on the demised premises caused proximately by the tenant's negligence, even though the lease contains a provision that at the end of the term he shall yield possession "subject to loss by fire" ';
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> citing *Brophy v. Fairmont Creamery Co.*, 98 Neb. 307, 152 N. W. 557, and *Carstens v. Western Pipe & Steel Co.*, 142 Wash. 259, 252 Pac. 939. These cases unquestionably support the text" (R. 553; 184 F. (2d) at 371).[10]

It will be noted that the opinion of the court of appeals does not cite a single authority, Minnesota or otherwise, in respect of the meaning of the covenant involved. The authorities it cites concern the propositions that public policy favors the enforcement of a contract as actually made, and that under Minnesota law a contract between private parties to relieve one of the parties from liability for negligence is permissible (R. 544; 184 F. (2d) 366) —propositions not disputed.

It is noteworthy that the court below, less than two months after the instant decision (three different judges sitting), affirmed a judgment for a lessor in his suit against the lessee for negligently causing the leased

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[10]The case most helpful to respondent's claim is **Slocum v. Natural Products Company**, 292 Mass. 455, 198 N. E. 747. But, as Judge Sanborn points out, that case is not controlling or even persuasive (R. 553; 184 F. (2d) at 371). It was a suit in **contract** for breach by the lessee of a covenant in the lease "to make all repairs, both outside and inside usual or necessary * * * damage by fire or unavoidable casualty only excepted." The court held that this exception included a fire resulting from negligence, insofar as an action in contract was concerned, but stated: "It does not necessarily follow that the lessors would have no action in tort for the damage sustained" (292 Mass. at 457). In **Commercial Union Assur. Co. v. Foley Bros.**, 141 Minn. 258, 169 N. W. 793, heavily relied on by respondent below, the exculpatory clause in the lessor's favor by its very terms necessarily included negligence, reading "for or on account of any loss or damage sustained by water or fire howsoever coming or being within said premises" (141 Minn. at 259).

building to burn. *Standard Brands v. Bateman* (8th Cir., Nov. 13, 1950), 184 F. (2d) 1002. In that case the lease provided that the lessee at the end of the term would surrender the premises in as good condition as received "reasonable wear and tear and damages by the elements only excepted" (184 F. (2d) at 1006). The court made clear its obligation to follow the local law in a diversity case (184 F. (2d) at 1006-1007) and that, in deciding a disputed question of local law, it would "defer to the opinion of the trial court who is a Missouri lawyer of long experience and who has been a justice of the Supreme Court of that state" (184 F. (2d) at 1011).

This express acknowledgment of the principles which should control a court of appeals in reviewing a diversity case, made less than two months after the instant decision, throws into clear focus the serious departure of the instant decision from the accepted and usual course of judicial proceedings.

We therefore submit that the refusal below to follow on a question of Minnesota law, the experienced trial court's clearly correct determination thereof, fully concurred in by the only Minnesota jurist on the court of appeals, was such a departure from the accepted and usual course of judicial proceedings as to call for certiorari.

Cf. *Thompson v. Consolidated Gas Co.* (1937), 300 U. S. 55, 74-75.

Henderson Co. v. Thompson (1937), 300 U. S. 258, 266.

Reitz v. Mealey (1941), 314 U. S. 33, 39.

MacGregor v. State Mutual Co. (1942), 315 U. S. 280, 281.

Helvering v. Stuart (1942), 317 U. S. 154, 163.

Steele v. General Mills (1947), 329 U. S. 433, 439.

(2)

The court of appeals arbitrarily and in violation of a cardinal rule of appellate procedure substituted its determination of fact for that of the trial court.

The underlying premise of the court of appeals' reversal is that there was a "mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage" (R. 539; 184 F. (2d) at 364).

Not only is this premise wholly unsupported by the evidence, but it is directly contrary to the trial court's careful determination of the relevant facts, made in connection with his construction of the lease. This most succinctly appears by contrasting the court of appeals' determinations with those of the trial court:

(i)

Court of appeals:

"The circumstances also indicate the intention that the cost of the insurance would be taken out of the rentals. The investing for income purposes of their own and the borrowed money by the plaintiff's predecessors necessarily involved computing the rentals promised in the lease and deducting the cost of fire insurance at the applicable high rate. They could not estimate the income without considering both factors. They necessarily consciously figured on the rentals to be paid by the tenant as the source of the fire insurance premium and intended that the cost of insurance was to come from the tenants. In practical effect the tenant paid the cost of the fire insurance" (R. 543; 184 F. (2d) at 366).

District court:

"Defendant assumes and contends that the insurance premiums were paid with the rent money received by the plaintiff and therefore that the defendant should be given the benefits of the insurance

purchased and paid to the plaintiff. But there is no evidence that plaintiff paid the premiums out of his rent, rather than from any other funds on hand. Defendant has not shown that the premiums which the insurance company received were derived from the rental payments. No separate part of the rent money was earmarked for insurance money and part for rent. And it does not appear that the insurance premiums entered into the determination of the rental price. This is evident from the conferences between the parties after the lease was executed" (R. 496-497).

(ii)

Court of appeals:

"But we think the court erred in attempting to ascribe an intent and meaning to the exception of loss by fire provision of this lease independent of the mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage and that the conclusion and judgment the court arrived at were erroneous" (R. 539-540; 184 F. (2d) at 364).

"The landlords here agreed that the tenant should not be liable to pay for 'loss by fire' because it was understood between them that fire insurance would be taken out and a fire insurance company would be required to pay for any 'loss by fire' occurring on the premises during the term of the lease" (R. 540; 184 F. (2d) at 364-365).

District court:

"Defendant's contention that because plaintiff could obtain insurance against fire losses, it should have been entitled to assume that it would not be liable for negligently setting a fire really concerns what might have been arranged, or what could have been done, not what was intended in this particular situation" (R. 496).

"But because plaintiff obtained insurance for himself does not mean that he also was obligated to

> obtain insurance at his expense for the benefit of the defendant, who was receiving the use of the property by the payment of annual rent" (R. 496).

In thus rejecting the trial court's determinations of fact, the court of appeals violated the cardinal rule of review, repeatedly emphasized by it, that the appellate court should not substitute its judgment on the facts for that of the trial court.

Storley v. Armour & Co. (8th Cir., 1939), 107 F. (2d) 499, 505.

Cleo Syrup Corp. v. Coca Cola Co. (8th Cir., 1943), 139 F. (2d) 416, 417-418, cert. denied 321 U. S. 781.

Woods v. Benson Hotel Corporation (8th Cir., 1949), 177 F. (2d) 543, 545.

Cf. *Nolley v. Chicago, M. St. P. & P. R. Co.* (8th Cir., 1950), 183 F. (2d) 566, 572.

It is submitted that such a violation calls for this court's supervision.

(3)

The court of appeals arbitrarily rejected the district court's determination of Minnesota law on the effect of petitioner's procurement of insurance.

The court of appeals' assumption that there was a "mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage" (R. 539; 184 F. (2d) at 364) is so devoid of support[11] as to indicate that the court really

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[11]It will be noted that (i) fire insurance was not procured until January 28, 1947, approximately three months after the execution of the lease on November 1, 1946, 2½ months after petitioner's purchase of the property, and 28 days after the first day of the lease's term (R. 6, 78, 89, 90, 525). On March 29, 1947, approximately five months after execution of the lease, respondent inquired of petitioner as to who was

is holding that petitioner's mere procurement of insurance somehow exonerates respondent.[12] But this is directly contrary to Minnesota law. As Circuit Judge Sanborn put it:

> "That the insurer is entitled to recoup its loss out of what the [respondent] owes [petitioner] for having negligently destroyed the insured building, is in my opinion, of no legal concern to the [respondent]" (R. 560; 184 F. (2d) at 374).
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> *Evans v. Chicago, M. & St. P. Ry. Co.*, 133 Minn. 293, 158 N. W. 335.
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> *Solberg v. Minneapolis Willys-Knight Co.*, 177 Minn. 10, 224 N. W. 271.
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> *Donohue v. Acme Heating S. M. & R. Co.*, 214 Minn. 424, 8 N. W. (2d) 618.

Such departure from the controlling Minnesota law, as determined by the experienced district court, invokes the certiorari jurisdiction.

See cases decided by this court, cited under (1), page 22, *supra*.

(4)

Assuming the points of Minnesota law to be doubtful, there was no justification for reversing the experienced district court's determination thereof.

Circuit Judge Sanborn succinctly puts what is an additional reason for certiorari:

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responsible for fire insurance (R. 237, 239); (ii) petitioner agreed to buy the property, and took as assignee of the lease from his predecessor Char-Gale Manufacturing Company, on November 15, 1946, or about two weeks after the lease was executed between said predecessor and respondent (R. 77, 78, 91, 139, 427, 525); (iii) the lease contains the tenant's covenant "to save the lessor harmless" from "any act or neglect of the tenant" (R. 82); and (iv) the lease concludes with the provision, "There are no understandings or agreements outside of this lease" (R. 89).

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[12]Even assuming exoneration of respondent, on some theory, to the extent of petitioner's insurance recovery, it is to be noted that petitioner, by virtue of the court of appeals' reversal, is out $31,856.10, plus interest and costs, over and above such insurance recovery. See footnote 6, **supra**.

"But even if the question of the asserted exoneration of the defendant under the exception 'loss by fire' in the surrender clause of the lease were doubtful—which I think it is not—this Court should accept the views of the District Court as to that question of local law. *Magill v. Travelers Insurance Co.* (8th Cir.), 133 F. (2d) 709, 713; *Doering v. Buechler* (8th Cir.), 146 F. (2d) 784, 788; *Russell v. Turner* (8th Cir.), 148 F. (2d) 562, 564; *Mast v. Illinois Central R. Co.* (8th Cir.), 176 F. (2d) 157, 163; *Northern Liquid Gas Co. v. Hildreth* (8th Cir.), 180 F. (2d) 330, 336" (R. 554; 184 F. (2d) at 371).

CONCLUSION

Wherefore it is respectfully requested that this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Dated: Minneapolis, Minnesota, January, 1951.

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